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No. 01-618

IN THE

Supreme Court of the United States

ERIC ELDRED, *et al.*,
Petitioners,

v.

JOHN D. ASHCROFT,
in his official capacity as Attorney General,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF *AMICUS CURIAE* RECORDING INDUSTRY ASSOCIATION OF AMERICA IN SUPPORT OF RESPONDENT

MATTHEW J. OPPENHEIM
STANLEY PIERRE-LOUIS
RECORDING INDUSTRY ASSOCIATION OF AMERICA
1330 Connecticut Ave., N.W.
Suite 300
Washington, D.C. 20036
(202) 775-0101

DONALD B. VERRILLI, JR.
Counsel of Record
THOMAS J. PERRELLI
WILLIAM M. HOHENGARTEN
JENNER & BLOCK, LLC
601 13th Street, N.W.
Washington, D.C. 20005
(202) 639-6000

Counsel for Amicus Curiae *Recording Industry Association of America*

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INTEREST OF *AMICUS CURIAE*[1]

The Recording Industry Association of America ("RIAA") is a trade group representing the American music recording industry. Its members are the record companies that comprise the most vibrant national music industry in the world. RIAA's members create, manufacture and/or distribute approximately 90 percent of all legitimate sound recordings produced and sold in the United States.

Two core components of the RIAA's mission are central to this case: protecting the First Amendment freedom of artists and defending the rights of intellectual property owners. As creators and distributors of artistic works – works that are sometimes controversial – RIAA's members are dedicated to opposing censorship in any form. RIAA's members are also vitally interested in intellectual property rights. RIAA's members hold many copyrights to sound recordings. At the same time, RIAA's members must obtain licenses to use copyrighted works in their sound recordings, including licenses to use the underlying musical composition performed in a sound recording and licenses to use existing sound recordings that are "sampled" in new recordings.

As entities that are both copyright holders and licensees, RIAA's members have a very strong interest in ensuring that the standard that the Court employs to resolve this case respects the unique institutional competence of Congress to balance the interests of copyright owners, licensees, and the public when it formulates copyright law. Indeed, given recent rapid technological advances and the use of such technologies to foil the rights of copyright holders, Congress's role in protecting copyright by enacting new laws to

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[1] This brief is filed with the consent of the parties, as indicated by letters filed with the Court. No party authored this brief in whole or in part and no one, other than *amicus curiae*, its members, or its counsel monetarily contributed to the preparation or submission of this brief.

adjust to the changing and increasingly complex battle between copyright and piracy has never been more important.

SUMMARY OF ARGUMENT

Petitioners purport merely to challenge extensions of pre-existing copyrights in the Copyright Term Extension Act ("CTEA").[2] Their arguments, however, go far beyond that narrow issue. If adopted, the aggressive standards of review urged by Petitioners would require this Court to sit as a "superlegislature," second-guessing Congress's every policy judgment concerning the length, scope, and other characteristics of copyright protection. The Judiciary would be embroiled in the balancing of competing policies and values that is properly the business of the political branches. The resulting weakening of copyright protections would pave the way for piracy of artistic works after copyright holders have invested the very substantial time and money necessary to create, promote, and disseminate those works to the American public.

The First Amendment's bulwark against censorship does not require heightened scrutiny of copyright laws. Copyright is itself an engine of free expression. Therefore, it would be entirely inappropriate to presume that First Amendment values weigh against copyright protection. To be sure, it would violate the First Amendment if Congress used copyright law to censor disfavored speech. But, as Petitioners concede, the law at issue here is content-neutral. And absent censorship of specific speech, the fact that copyright affects speech cannot justify any heightened scrutiny.

Strong copyright protection furthers the First Amendment interests of artists and the public by providing an incentive to create, disseminate, and promote original artistic works – and a corresponding disincentive against merely copying existing works. Petitioners completely ignore those First Amendment interests. They focus solely on the interests of those who want to *copy* existing works created and popularized by others – with no compensation to the author (or the author's heirs or other assignees). The idea/expression dichotomy and fair use defense ensure that copyright does not prevent anyone from expressing their ideas in their own words, or even from appropriating copyrighted material to the extent necessary for a genuinely transformative or critical work. In short, strong First Amendment interests favor strong copyright laws, and the First Amendment should not tip the constitutional scale against such laws.

Petitioners' arguments concerning the interpretation of the Copyright Clause, U.S. Const. art. I, § 8, cl. 8, also fail. Nothing in the preamble to the Copyright Clause compels the courts to test copyright laws against Petitioners' favored economic theories or extremely limited view of what constitutes progress in art, music, and literature. Petitioners assume that the only permissible purpose of copyright is to provide a barely sufficient incentive to authors to *create* works. Yet, as this Court has recognized, fair compensation to authors is also a legitimate concern of copyright law. Just as importantly, the need for incentives to "promote the Progress of Science" does not end the moment a work is created. There must also be incentives to disseminate the work and market it so that it comes to the public's attention. Given that the cultural marketplace is global, harmonizing international copyright law is also a legitimate goal that Congress may pursue. Extending the terms of preexisting copyrights reasonably furthers all these ends. The Court should not accept Petitioners' invitation to substitute its own judgments for those of Congress concerning the best way to achieve these diverse goals.

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[2] Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1998) ("CTEA").

Finally, the distinctive history of copyrights for sound recordings refutes Petitioners' oversimplified assumptions about copyright law and the CTEA in particular. That history demonstrates that, if Congress in 1790 had wanted to create a uniform system of copyright for future works, but leave only the state law protections in place for existing works, it could have done so – just as Congress did in 1972 with respect to sound recordings. That the first Congress chose to apply the new federal copyright term to existing works shows that, in the eyes of the Framers, neither the Copyright Clause nor the First Amendment prohibits the extension of new copyright protection to pre-existing works. That understanding by the Framers is fatal to Petitioners' case. Moreover, with respect to many sound recordings (those created prior to 1972), the CTEA does not give authors rights beyond those that existed when the recordings were created; rather, it restores rights that existed at creation but were subsequently stripped away. Thus, Petitioners' arguments have no applicability to the CTEA as it applies to many sound recordings.

ARGUMENT

I. BECAUSE COPYRIGHT IS AN ENGINE OF FREE EXPRESSION, COPYRIGHT LAWS ARE NOT PRESUMPTIVELY SUSPECT OR SUBJECT TO HEIGHTENED SCRUTINY UNDER THE FIRST AMENDMENT.

A. The First Amendment Should Not Tip the Scales Against Copyright Protection, Which Is Critical to Ensuring a Vibrant Marketplace of Ideas.

The RIAA and its members are dedicated defenders of the First Amendment and vigorously oppose government-sponsored censorship in all its forms. Far from promoting

censorship, however, generally applicable copyright laws promote free expression and a vibrant marketplace of ideas. For that reason, heightened First Amendment scrutiny should not apply to copyright legislation such as the CTEA.

The Copyright Clause is unique among the Constitution's grants of power to Congress and, indeed, unique among all provisions of the Constitution. Unlike every other constitutional provision, the Copyright Clause expressly and specifically gives Congress the power to legislate concerning *speech*, "by securing for limited Times to *authors* . . . the exclusive Right to their respective *Writings* . . . ." U.S. Const. art. I, § 8, cl. 8 (emphasis added). Thus, copyright legislation is unlike laws affecting speech enacted under other constitutional provisions, such as the Commerce Clause or the Necessary and Proper Clause. The Framers fully intended Congress to legislate concerning speech under the Copyright Clause – to grant "authors" exclusive rights and thereby to exclude others from copying those writings without permission. And the Framers stated in the Constitution why they gave Congress this specific power, but not other powers, to legislate concerning speech: because such legislation will "promote the Progress of Science." *Id.* As this Court has observed, "the Framers intended copyright itself to be the engine of free expression." *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985).

Thus, the Copyright Clause has a complementary relationship to the Free Speech Clause of the First Amendment, in that the Framers addressed both Clauses to the same subject (legislation affecting speech) for the same purpose (ensuring free expression). This relationship between the two Clauses strongly suggests that modes of First Amendment analysis that are appropriate to legislation enacted under other constitutional provisions are misdirected when applied to copyright legislation. In other contexts, heightened First Amendment scrutiny is applied to every "regulation of

speech": strict scrutiny if the regulation is content-based, and intermediate scrutiny if it is content-neutral. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). Although intermediate scrutiny allows more leeway for regulation than does strict scrutiny, even intermediate scrutiny imposes a substantial burden on the government to justify regulations of speech. *See id.* In effect, the "thumb" of the First Amendment is placed on the constitutional scale against such regulation. But that bias against regulation of speech, entirely proper elsewhere, is not justified in the context of copyright protection. Because the Framers saw copyright as "the engine of free expression," it would be wrong to presume that copyright legislation *defeats* free expression or is in any way suspect under the First Amendment.

Thus, neither this Court nor the lower courts have ever applied the First Amendment "levels of scrutiny" framework to copyright laws. Instead, courts have recognized that copyright law dovetails with the First Amendment both to promote free expression and to balance the expressive interests of authors and the public against the expressive interests of would-be copiers. In particular, two structural features of copyright law ensure that it does not evolve from an "engine" into an impediment of free expression: the definitional distinction between protectible expression and unprotectible ideas (and facts), and the fair use defense. *See, e.g., Harper & Row*, 471 U.S. at 560-61. As long as copyright law incorporates these structural features, Congress's policy judgments concerning the optimal duration and other aspects of copyright protection are presumptively valid and not subject to heightened scrutiny under the First Amendment.

To be sure, the First Amendment bars government from censoring not only ideas, but also specific expressions of ideas. *See, e.g., Cohen v. California*, 403 U.S. 15 (1971). Obviously, Congress could not ban a particular sound recording with "incendiary" or "shocking" lyrics, even if the

underlying ideas could be expressed in other forms. Nor could Congress achieve the same result through copyright legislation that singled out the recording for special treatment to hinder its dissemination. *Cf. United Christian Scientists v. Christian Science Bd. of Directors*, 829 F.2d 1152 (D.C. Cir. 1987) (striking down, under Establishment Clause, law giving one church group special extended copyright in specific canonical work to prevent dissenting group from disseminating work); *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105 (1991) (striking down "Son of Sam Law" that imposed content-based burden on speech by requiring that the author's income from certain publications be paid to crime victims). Thus, if a copyright law singled out disfavored speakers or speech, the law could be subject to heightened First Amendment scrutiny.[3]

Petitioners concede, however, that the CTEA does not single out any viewpoint or subject matter for more or less favorable treatment. Pet. Br. 37. The threat of censorship of specific disfavored speech is therefore absent here. In this context, the distinction between copyrightable expressions and uncopyrightable ideas ensures that copyright remains the engine of, rather than an obstacle to, free expression. *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349-50 (1991) ("copyright assures authors the right to their original expression, but encourages others to build freely upon the ideas and information conveyed by a work").

In promoting free expression, copyright protection balances the First Amendment interests of authors, copiers, and the public. Copyright is essential to protecting the First Amendment interests of authors. By granting an "author"

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[3] To the extent that the opinion of the Court of Appeals is inconsistent with this point, its language suggesting that the idea/expression distinction renders "copyrights . . . categorically immune from challenges under the First Amendment," *Eldred v. Reno*, 239 F.3d 372, 375 (D.C. Cir. 2001), goes too far.

exclusive rights to his original "writings," copyright creates a strong economic incentive for the creation and dissemination of original works, an incentive which is critical to a free and robust "marketplace of ideas." Indeed, the Court has recognized that taking away this incentive can be tantamount to the suppression of ideas. *Simon & Schuster*, 502 U.S. at 118 (applying strict scrutiny to "financial disincentive to create or publish works with a particular content"). In addition, copyright protection enables authors to determine when and how their original expression is disseminated to the public. Again, the Court has rightly recognized that speakers have a very strong First Amendment interest in controlling their own message. *See, e.g., Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995); *Harper & Row*, 471 U.S. at 559-60, 564. In short, there are strong First Amendment interests favoring copyright protection, which counsel forcefully against treating such protection as suspect or in need of heightened scrutiny.

Petitioners ignore the First Amendment interests of the author and dwell exclusively on those of the copier. But, in the absence of a license, copyright merely restricts the copier's ability to duplicate the author's original expression – it does not prohibit the copier from expressing any idea in his or her own music, words, or images. Indeed, the copyright in a sound recording bars only the literal copying of the "actual sounds fixed in the recording," not the independent reproduction of the very same musical sound (say, by another orchestra recording the same symphony). 17 U.S.C. § 114(b).[4] That is no limitation on the copier's freedom of expression, but only on his ability to appropriate the fruit of someone else's creativity and labor without paying for it.

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[4] If the underlying "musical work," or composition, is itself copyrighted, reproduction of the same sounds may require a license for that work, which is subject to a copyright distinct from that of the sound recording.

To be sure, there may be certain occasions when quoting limited portions of an author's expression – even reproducing limited "samples" of the "actual sounds" fixed in a sound recording – is necessary for creation of a new "transformative" work, such as a legitimate parody. But in those instances, the fair use defense prevents copyright from "'stifl[ing] the very creativity the law was intended to foster.'" *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994) (quoting *Stewart v. Abend*, 495 U.S. 207, 236 (1990)). For example, the fair use defense almost certainly shields a critical and transformative work like *The Wind Done Gone* from infringing the copyright on *Gone With the Wind*. *See SunTrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257 (11th Cir. 2001).[5] Thus, "*copyright does not immunize a work from comment and criticism.*" *Id.* at 1265 (emphasis in original). The fair use defense "serves the copyright objective of stimulating productive thought and public instruction without excessively diminishing the incentives for creativity." Pierre N. Leval, Commentary, *Toward a Fair Use Standard*, 103 Harv. L. Rev. 1105, 1110 (1990).

Even when copying does not constitute fair use, the copier may still obtain a license to use the protected work. In the world of sound recordings, there is an extremely large and active market for such licenses, including licenses for "samples" that are incorporated into new works. *See generally* Al Kohn & Bob Kohn, *The Art of Music Licensing* (1992). There is no reason why the copier should be relieved of the obligation to pay for appropriating another's expression. "Artists, no matter how great, must pay for what they

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[5] Petitioners misleadingly cite *SunTrust* as if it supported their contention that copyright law is in tension with the First Amendment. Pet. Br. 18. In fact, in *SunTrust* the Eleventh Circuit *vacated* a preliminary injunction against publication of *The Wind Done Gone* because the plaintiff's infringement suit was very unlikely to succeed in the face of the fair use defense's applicability.

use in making their works. They pay for paint, for canvas, for steel, for clay, for a model's time. Why should they not also pay a reasonable fee for the use of another artist's works as part of a new work?" Pierre N. Leval, Campbell v. Acuff-Rose: *Justice Souter's Rescue of Fair Use*, 13 Cardozo Arts & Ent. L.J. 19, 24 (1994).

From the foregoing, it follows that copyright protection also serves the First Amendment interests of the listening, reading, and viewing public. Copyright is a critical engine of free expression because it gives authors an incentive to create, publish, and disseminate original works for the benefit of the public. "Holding an infringer liable in copyright for copying the expression of another author's ideas does not impede First Amendment goals because the public purpose has been served – the public already has access to the idea or the concepts." *SunTrust*, 268 F.3d at 1264. Indeed, because copyright creates an economic *disincentive* simply to copy pre-existing works, copyright law further redounds to the benefit of the public by disfavoring mere reproduction in favor of creation of something original.

In sum, First Amendment interests favor strong copyright protections. It makes no sense to say that copyright laws should be presumed suspect simply because they affect speech. One could just as easily support the opposite proposition: laws that affect speech by *diminishing* copyright protection should be treated as suspect under the First Amendment, especially in light of the powerful ways in which copyright protection furthers the First Amendment interests of speakers and the public. But neither position is correct: the adjustment of copyright protections should be left to the policy and predictive judgments of Congress, without the thumb of the First Amendment being placed on either side of the scale, whether favoring greater or lesser protection.

B. Heightened Scrutiny Would Embroil the Court in Ad Hoc Policymaking About Every Aspect of Copyright Law.

Petitioners' rhetoric masks what they are asking for: the right to copy – jot for jot – the works of others, often in order to profit economically, without having to pay a licensing fee that recognizes the copyright holder's contribution in creating and popularizing the work. Thus, in many cases what Petitioners seek is not to create new works or add to the universe of ideas and expression available to the public. They seek merely to profit off works created by others that are already publicly available.

Nor is their effort to undermine copyright protection limited to this case. Indeed, much of what Petitioners and their *amici* complain about has nothing to do with copyright term extensions, but concerns other aspects of copyright law with which they disagree. For example, Petitioners complain that the first sale doctrine does not permit them to copy protected works and disseminate them on the Internet without compensating the author in any way. Pet. Br. 5-6, 38. Yet, the great advantage of the Internet – unparalleled speed and ease of communication – has also created an unparalleled threat of piracy that severely weakens traditional copyright protections. Over the Internet, a single digital copy of a work can be instantaneously disseminated to the world for downloading. *See, e.g., Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp. 2d 294, 314-15 (S.D.N.Y. 2000), *aff'd sub nom. Universal City Studios, Inc. v. Corley*, 273 F.3d 429 (2d Cir. 2001). Copyright piracy in the music business alone exceeds $4 billion annually, with most of the loss being absorbed by U.S. copyright holders. *2002 IFPI Music Piracy Report* at 1 (2002) (worldwide loss due to piracy $4.3 billion annually). Congress needs the flexibility to meet this threat effectively. In the area of sound recordings, for example, Congress has created a compulsory license available to

"webcasters" that transmit copyrighted recordings over the Internet, subject to certain conditions designed to hinder both copying and on-demand performances that could substitute for copies. *See* 17 U.S.C. § 114(d)(2). That compulsory license reduces transaction costs for webcasters while ensuring that the creator of a recording obtains compensation for the use of his or her work.

Nowhere do Petitioners explain why the First Amendment standard they propose should apply to copyright extensions, but not other generally applicable, content-neutral copyright laws. That is because they can find no principled rationale for limiting their extreme argument. Indeed, adoption of their proposed standard of review would wholly undermine Congress's ability to facilitate the use of new technologies for disseminating works while at the same time battling copyright piracy. Petitioners advocate a fact-intensive examination of every detail of copyright law under the standard applied in *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180 (1997), to determine whether Congress has struck the optimal balance for promoting expression. Under their argument, a decision by Congress to make the maximum copyright term 28 years (as the first Congress did) would be invalid unless an evidentiary record could be compiled showing that that term was better than 27 years. Similarly, courts would have to take evidence to determine whether the various conditions for a compulsory webcasting license are unduly restrictive, *e.g.*, must an archived program be at least five hours in duration to preclude a determination that it is an on-demand service, as Congress provided, 17 U.S.C. § 114(d)(2)(C)(iii)(I), or would four hours be sufficient? Simply posing these questions makes clear that Congress, not the Judiciary, is the body that must make such judgments.

Finally, Petitioners' proposed standard would draw both Congress and the courts into exactly the kind of content-based determinations the First Amendment forbids. At times, Petitioners appear to argue that the CTEA is unconstitutional because Congress did not limit the extension of additional copyright protection only to specific works, *e.g.*, films that still have economic value. *E.g.*, Pet Br. 45. In other words, copyright protection should be based on the value and character of *each particular work*. But in addition to being entirely unworkable, any such *content-specific* evaluation of copyright would raise serious First Amendment concerns. The conditions for obtaining copyright protection necessarily are, and have always been, general in character, without regard to whether a particular copyrightable work would have been created even without such protection.

II. UNDER THE COPYRIGHT CLAUSE, CONGRESS'S BALANCING OF DIVERSE INTERESTS AND POLICIES MUST BE RESPECTED.

Petitioners' Copyright Clause arguments suffer from the same flaws as their First Amendment arguments. Their interpretation of the Copyright Clause would narrowly cabin Congress's power to enact laws that respond to the dynamically changing world of copyright and would force the Judiciary to second-guess judgments that are quintessentially legislative in character.

Petitioners concede that Congress must have latitude to determine the duration of copyright terms under the "limited Times" language of the Copyright Clause (Pet. Br. at 14), but contend that, because of the preamble to the Copyright Clause ("To promote the Progress of Science"), any legislation enacted under the Clause must comport with Petitioners' own view of economic incentives, which recognizes only those incentives known by the author at the moment of creation. Nothing in the preamble of the Copyright Clause, however, suggests such drastic limitations on the authority of Congress. Rather, the Copyright Clause gives Congress broad power to enact legislation that, in its view, promotes

the arts and sciences by, among other things, fairly compensating authors for the fruits of their labors and furthering the harmonization of international copyright law.

A. The Rapidly Changing World of Copyright Requires Constant Adjustment to Ensure a Fair Return to Authors and a Vibrant Marketplace of Ideas for the Public.

Petitioners' narrow view of Congress's power under the Copyright Clause derives from an extremely simplistic model of copyright in which the only important step is the creation of a discrete work by a lone author. Based on that simplistic model, they argue that the only incentive needed for progress is one held out to the lone author at the moment of creation. The reality is much more complicated.

To begin with, the copyright system has always been intended to foster not only creation of works, but also publication, distribution, and promotion of those works. Indeed, prior to 1976, unpublished works were given no federal copyright protection at all. Moreover, neither "publication," as it was understood in pre-1976 copyright law, nor the mere release of a new work into "the public domain" is enough to make a book or recording available to the public in any but the most technical sense. For that reason, the Framers intended the Copyright Clause to give Congress the power to encourage the *dissemination* of works as well. *See Harper & Row*, 471 U.S. at 558 ("By establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and *disseminate* ideas") (emphasis added); *Stewart v. Abend*, 495 U.S. 207, 228 (1990) ("dissemination of creative works is a goal of the Copyright Act"); *Mills Music Inc. v. Snyder*, 469 U.S. 153, 187 (1985) (White J. dissenting) ("promoting public access to the arts . . . requires providing incentives both to the creation of works of art and to their dissemination"). Dissemination occurs not in the

lonely studio, but rather in the public marketplace, where larger and more complex economic forces are at play.

Bringing a creative work to the public requires production, marketing, and distribution, all of which require money. While digital technologies have made distribution (both legal and illegal) of some types of works easier, people still buy books, CDs, and DVDs. Thus, the works must be available in quantity (production), the public must know about them (marketing), and the public must be able to obtain them (distribution). Not surprisingly, many copyrighted works are created or disseminated by corporations. Those organizations, including RIAA's members, invest not only in the initial creation, but in all of the subsequent activities that bring the work to the public. Copyright law must necessarily extend to and encourage all of these activities, without which the copyright system would not be an engine of free expression.

Petitioners also fail to recognize that the copyright system exists against a dynamic backdrop, where the assumptions that underlie the last generation's copyright law – whether the life expectancy of authors, the commercial life of works, the technology that can be used to disseminate works, or the ease of piracy – can become quickly outmoded. If Congress could do nothing to protect the value of existing copyrights from the changing methods of those who would pirate copyrighted works, the *quid pro quo* that Petitioners claim the Copyright Clause offers to authors would mean very little; the "fair" return to authors in exchange for their creation would be lost to the ever-growing technological sophistication of copyright pirates.

Thus, virtually every important piece of copyright legislation in this Nation's history has been motivated by the need to respond to technological changes that have made copying easier and threatened the value of existing copyrights. "From its beginning, the law of copyright has devel-

oped in response to significant changes in technology. . . . Repeatedly, as new developments have occurred in this country, it has been Congress that has fashioned new rules that new technology made necessary." *Sony Corp. of Am. v. Universal Studios, Inc.*, 464 U.S. 417, 430-31 (1984) (footnote omitted); *see, e.g.*, Act of Mar. 4, 1909, Pub L. No. 60-349, 35 Stat. 1075 (giving musical work copyright owners control over mechanical reproductions).[6]

Finally, as has long been understood, copyright is not a purely domestic enterprise. The copyright extension granted in 1831 was passed "chiefly" to harmonize the term for domestic copyrights with those of authors abroad. *Fred Fisher Music Co. v. M. Witmark & Sons*, 318 U.S. 643, 650-51 (1943) (discussing legislative history of 1831 act). For much of the last century, debate in Congress has concerned harmonizing U.S. law with the Berne Convention for the Protection of Literary and Artistic Works, which originally sought a uniform international standard for copyright of life plus 50 years. With the increasingly global economy and the development of technologies that enable a thief in virtually any country to disseminate a pirated work worldwide with a single keystroke, international cooperation and the harmonization of international copyright law has never been more important. To be able to realize the commercial value of a work, a copyright owner, whether it be a lone author or a corporation, must live in a world where the international legal framework ensures a fair opportunity to obtain a return on one's creative efforts.

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[6] *See also Sony Corp.*, 464 U.S. at 431 ("Sound policy, as well as history, supports our consistent deference to Congress when major technological innovations alter the market for copyrighted materials. Congress has the constitutional authority and institutional ability to accommodate fully the varied permutations of competing interests that are inevitably implicated by such new technology").

Congress must weigh all of these factors when it legislates under the Copyright Clause. It thus should be no surprise that Congress has created a complex web of laws that seek a balance between fairness to the author and fairness to the public. The methods Congress has used to strike that balance have varied: extending copyright protection for existing works to a new medium (as Congress has done repeatedly through the years, including the Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, 109 Stat. 336); creating new and more effective enforcement mechanisms to protect the rights of copyright holders from new forms of piracy (as Congress did in the Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998)); extending copyright terms to recognize changes in the world since the creation of those works (as Congress did in the CTEA); requiring compulsory licenses, which are intended to ensure a fair return to authors and dissemination to the public, *see, e.g.*, 17 U.S.C. § 114(d)(2) (compulsory license for webcasting); 17 U.S.C. § 115 (compulsory license for making and distributing phonorecords); making exceptions for non-profit entities or educational institutions, such as libraries and archives, *see, e.g.*, 17 U.S.C. § 108. But the goal has always been the same – to be fair to authors by ensuring them a reasonable return on their efforts and to be fair to the public that benefits from a vibrant marketplace of ideas.

Striking the optimal balance among all of these complex concerns is plainly beyond the institutional competence of the Judiciary. Indeed, the Court has repeatedly recognized that it is Congress's job to make such decisions:

> As the text of the Constitution makes plain, it is Congress that has been assigned the task of defining the scope of the limited monopoly that should be granted to authors or to inventors in order to give the public appropriate ac-

> cess to their work product. Because this task involves a difficult balance between the interests of authors and inventors in the control and exploitation of their writings and discoveries on the one hand, and society's competing interest in the free flow of ideas, information, and commerce on the other hand, our patent and copyright statutes have been amended repeatedly.

Sony Corp., 464 U.S. at 429; *Stewart*, 495 U.S. at 230 ("[The] evolution of the duration of copyright protection tellingly illustrates the difficulties Congress faces in attempting to 'secur[e] for limited Times to Authors . . . the exclusive Right to their respective Writings.' . . . . [I]t is not our role to alter the delicate balance Congress has labored to achieve") (internal citation omitted).

Petitioners, however, would re-assign that constitutionally defined role to the Judiciary, forcing the courts to test every adjustment to copyright laws against the particular economic theory favored by Petitioners. Relying on cases like *United States v. Lopez*, 514 U.S. 549 (1995), and *City of Boerne v. Flores*, 521 U.S. 507 (1997), Petitioners contend that the CTEA is similarly beyond Congress's authority. But that comparison does not withstand even minimal scrutiny. In *Lopez*, the Court held that Congress was seeking virtually unlimited power at the expense of the States by means of the Commerce Clause. In *City of Boerne*, the Court held that Congress was seeking to dictate the results of cases and the interpretation of the Constitution, at the expense of both the Judiciary and the States. By contrast, there is no conceivable threat to the constitutional plan through an exercise of Congress's authority under the Copyright Clause, such as the CTEA. Regardless of how one interprets its introductory language, the Copyright Clause is limited to granting exclusive rights in works to their authors for "limited times." As

Petitioners here concede, there is no doubt that Congress has the authority to establish the duration of copyright terms. Pet. Br. at 14 (conceding that whether 50 or 70 years is enough protection "is not a judgment meet for this Court"). Petitioners' *only* argument is that Congress should not have the ability to adjust those terms as circumstances change. Thus, this case in no way presents the institutional and federalism issues raised by *Lopez* and *City of Boerne*.

Ultimately, Petitioners' theory would strip Congress of a power that the Framers intended Congress to have – the power under the Copyright Clause to balance all of the myriad factors involved in promoting a vibrant marketplace of ideas that is both fair to authors and fair to the public. Congress concluded that the CTEA would be most fair to both creators and the public domain and would advance the interests of the United States worldwide. S. Rep. No. 104-315, at 1 (1996) ("Senate Report"). That conclusion – the right one – should not be second-guessed here.

B. In Enacting Copyright Legislation, Congress May Consider More than the Narrow Economic Theory Advanced by Petitioners.

In crafting copyright laws, Congress may take into account policies other than the narrow set of economic incentives recognized by Petitioners. Even accepting the preamble of the Copyright Clause as a limitation, its language – "To promote the Progress of Science and useful Arts" – does not dictate a single, narrow economic theory. To the contrary, the language broadly gives power to Congress to take steps it believes will advance progress.

To begin with, this Court has recognized that fair compensation of authors is a proper policy consideration for copyright legislation. *Stewart*, 495 U.S. at 229 ("The rights conferred by copyright are designed to assure contributors to the store of knowledge a fair return for their labors") (internal

quotation marks and citation omitted). Adjusting the terms of pre-existing copyrights is one way that Congress can choose to ensure that authors continue to receive a fair return on their creative efforts. Thus, where Congress finds that creative works continue to have economic value beyond the old term or that the old term does not provide sufficient compensation to the heirs of authors due to altered patterns of childbearing and changes in life-expectancy, Congress could reasonably determine that an extension is necessary to keep the original bargain with the author. Those are exactly the findings Congress made here. *See* Senate Report at 10 (finding that the terms established by the 1976 Act were "increasingly inadequate to protect some works for even one generation of heirs as parents are living longer and having children later in life"); *id.* at 11 (extension appropriate "[i]n order to reflect more accurately Congress' intent and the expectation of America's creators that the copyright term will provide protection for the lifetime of the author and at least one generation of heirs"); *id.* at 12 ("the likelihood that a work will remain profitable beyond the current term of copyright protection has increased significantly").[7]

Similarly, Congress could fairly judge – as it did – that harmonizing copyright terms with Europe and other countries would promote progress by simplifying the world of international copyright and by ensuring full protection for U.S. copyright holders abroad. In 1976, Congress concluded that copyright harmonization was necessary because

> the disparity in the duration of copyright has provoked considerable resentment and some proposals for retaliatory legislation. Copyrighted works move across national boundaries faster and more easily than virtually any other economic commodity . . . . The need to conform the duration of U.S. copyright to that prevalent in the rest of the world is increasingly pressing in order to provide certainty and simplicity in international business dealings.

[7] Similar findings formed part of the basis of the Copyright Act of 1976. *See* H. Rep. No. 94-1476, at 135 (1976) (noting the "striking statistical increase in life expectancy since 1909"); *id.* at 134 (explaining that "[t]he tremendous growth in communications media has substantially lengthened the commercial life of a great many works").

See H.R. Rep. No. 94-1476, at 135 (1976).[8] Given technological advances over the last two decades, it is hardly surprising that Congress re-affirmed in the CTEA the importance of international cooperation – led by the United States:

> Uniformity of copyright laws is enormously important to facilitate the free flow of copyrighted works between markets and to ensure the greatest possible exploitation of the commercial value of these works in world markets for the benefit of U.S. copyright owners and their dependents. Indeed, in an age where the information superhighway offers widespread distribution of copyrighted works to almost anywhere in the world at limited costs, harmonization of copyright laws is imperative to the international protection of those works and to the assurance of their continued availability.

[8] Petitioners concede that harmonization of *domestic* copyright protection by the first Congress was a permissible policy consideration under the Copyright Clause and justified extending existing copyright protection, Pet. Br. at 29. That position is wholly at odds with Petitioners' claim that *international* harmonization cannot be considered by Congress when legislating under the Copyright Clause. Given the nature of the global economy today, the benefits of international harmonization are strikingly similar to the benefits that the Framers saw in having a uniform national system of copyright. *See, e.g.*, The Federalist No. 43 (Madison).

Senate Report at 8.

Thus, Congress reasonably concluded that the CTEA was a significant step in the effort to harmonize copyright protection in an information technology world that is increasingly without boundaries. Petitioners do not actually quarrel with this notion. Rather, they intone their narrow view of the Copyright Clause and then claim that the CTEA does not fully harmonize copyright terms. But the latter argument is merely a disagreement with Congress over the effects of the CTEA and its importance in promoting international harmonization. This Court should decline the invitation to second-guess Congress's judgment in this matter.

C. Even If One Accepted Petitioners' Incorrect Reading of the Copyright Clause, Congress's Policy Judgments Embodied in the CTEA Are Reasonable and Consistent with the Policies Underlying the Clause.

Even if Petitioners' view of the Copyright Clause were correct, the CTEA would still pass muster. The incentive effects of copyright law – and Congress's judgments in this area – are far more complex than Petitioners acknowledge. The CTEA gives holders of existing copyrights incentives to create derivative works and to disseminate existing works. Moreover, the CTEA creates incentives for those in the future who may create totally new works – in exactly the narrow manner Petitioners claim is permissible – by giving them assurance that the fruits of their labors will be fairly rewarded by the copyright system.

In an effort to suggest that the CTEA creates no incentives, Petitioners describe the CTEA's extension of copyright as "retroactive." Although it affects pre-existing works, the CTEA is not, properly speaking, retroactive. It does not, for example, remove U.S. works currently in the public domain, as this Court suggested is prohibited in *Graham v.*

John Deere Co., 383 U.S. 1 (1966) (dictum). Rather, the CTEA is "secondarily retroactive" because it alters the *future* legal effect of past decisions (rather than the *past* legal effect of past decisions). *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 219 (1988) (Scalia, J., concurring). Because the CTEA changes legal consequences in the future, it does affect current behavior and thus can affect current incentives.

By extending the scope of future legal rights, the Act induces a current copyright holder to disseminate copyrighted and derivative works more broadly than if there were no extension. For example, a copyright holder considering re-releasing a work whose copyright is about to expire faces an economic choice. Re-releasing a work entails fixed costs of marketing, production, and distribution. Without the extension, another company can wait to see if the re-release is a hit and, if so, issue a similar re-release with confidence it will sell. In such a scenario, the first company takes the risk and pays the cost of determining and stimulating demand; the second company merely poaches off the first company's expenditures. Congress recognized this in 1976 when it extended copyright terms:

> Although limitations on the term of copyright are obviously necessary, too short a term harms the author without giving any substantial benefit to the public. The public frequently pays the same for works in the public domain as it does for copyrighted works, and the only result is a commercial windfall to certain users at the author's expense. In some cases the lack of copyright protection actually restrains dissemination of the work, since publishers and other users cannot risk investing in the work unless assured of exclusive rights.

H.R. Rep. No. 94-1476, at 134-35 (1976).

The same incentives apply with respect to creation of derivative works, which this Court has recognized is an important part of the incentive to create original works in the first place. *See Harper & Row*, 471 U.S. at 568 ("market for derivative works" is valuable and worthy of protection); *Campbell*, 510 U.S. at 593 ("the licensing of derivatives is an important economic incentive to the creation of originals"). A decision to digitally re-master a recording or motion picture whose copyright is due to expire soon is an economic gamble about consumer demand. Without a copyright extension, the original owner or licensee may simply not take the gamble because, even if the re-mastered version is a popular success, any economic benefit would be eroded by competing firms free-riding on the original owner's efforts.

Similarly, a record company with a catalog of well-regarded classical or jazz recordings may find that marketing and releasing new high-quality recordings actually stimulates sales of its older recordings. The new recordings burnish the image of their brand; in fact, new recordings may be *required* to maintain brand presence in the current marketplace. An extension of copyright for these older recordings will increase the benefit of releasing new recordings – thus providing a current incentive to keep creating. More generally, control over derivative works is critical to the effective use of a brand or creative franchise, such as a series of novels or a series of CDs that advance a particular theme. If anyone were free to copy such works – with no single copyright holder to ensure quality – the entire enterprise would soon lose its reputation. In the end, without copyright, no one would be willing to produce additional works in a series, because no one would be willing to buy items of dubious quality.

Petitioners also fail to recognize the broader positive incentive effects established by a *flexible*, rather than a rigid, copyright power. This Court has recognized that "[r]etroactivity provisions often serve entirely benign and legiti-

mate purposes" – including "to correct mistakes . . . or simply to give comprehensive effect to a new law Congress considers salutary." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 267-68 (1994). A creator who believes that Congress has power to revise copyright terms will form a different set of expectations than one who believes that terms are set in stone. Incentives to create are significantly enhanced if creators understand that Congress can adjust copyright terms based on, among other things, fairness to authors, or the impact of changing technology on the fair value of copyrights (such as unforeseen decreases in the value of copyright based on new forms of piracy, etc.). Indeed, several artists testified that the belief that the copyright system would ensure fair compensation for themselves and their heirs was an incentive to create. *See, e.g., Copyright Term Extension Act of 1995: Hearings on S. 483 Before the Senate Comm. on the Judiciary*, 104th Cong. (Sept. 20, 1995) (Statement of Carlos Santana), *available at* 1995 WL 557183; *Copyright Term Extension Act of 1995: Hearings on H.R. 989 Before the House Comm. on the Judiciary, Courts, and Intellectual Property*, 104th Cong. (July 13, 1995) (Statement of Bob Dylan), *available at* 1995 WL 418349; *id.* (Statement of Quincy Jones), *available at* 1995 WL 418350.

III. THE DISTINCTIVE HISTORY OF COPYRIGHTS FOR SOUND RECORDINGS ILLUSTRATES THE OVERSIMPLIFIED CHARACTER OF PETITIONERS' THEORIES.

Petitioners' simplistic approach is also refuted by the distinctive history and character of federal copyright protection for sound recordings. Prior to 1972, sound recordings as such did not enjoy federal copyright protection. Federal law thus did not prohibit "record piracy," or the making and selling of copies of sound recordings created by someone else. *See, e.g., Goldstein v. California*, 412 U.S. 546 (1973); *Capitol Records, Inc. v. Mercury Records Corp.*, 221 F.2d 657

(2d Cir. 1955). That void in federal legislation was filled by state statutes and common law. For example, California prohibited the unauthorized copying and sale of sound recordings, and that protection against unauthorized copying under California law lasted "for an unlimited time." *Goldstein*, 412 U.S. at 550 (upholding California statute against challenge under Copyright and Supremacy Clauses).[9]

Congress filled this gap in federal law by giving *federal* copyright protection to sound recordings for the first time beginning on February 15, 1972. Act of Oct. 15, 1971, Pub. L. No. 92-140, 85 Stat. 391; *Goldstein*, 412 U.S. at 552. In enacting that legislation, "Congress was spurred to action by the growth in record piracy, which was, in turn, due partly to technological advances," 412 U.S. at 562 n.17 – advances analogous to, though vastly less sophisticated than, the digital revolution of today. However, the new federal protection for sound recordings applied only to those recordings made, or "fixed," after the effective date of the new act, February 15, 1972. Pub. L. No. 92-140, § 3, 85 Stat. at 392; *see* 17 U.S.C. § 301(c). Thus, state laws protecting sound recordings, such as the California statute upheld in *Goldstein*, remained in full force and effect with respect to recordings fixed before 1972 – including many or all of the recordings

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[9] In *Goldstein*, this Court acknowledged Congress's power to address copyright protection for pre-existing works, including extending copyright protection to such works. *Id.* at 571 (noting that the California statute would remain the sole protection for pre-1972 sound recordings "[u]ntil and unless Congress takes further action with respect to" such recordings). Similarly, in *Mills Music*, the Court defined the rights of an author and subsequent licensees that were created by the 1976 Act and did not exist at the time of the creation of the work. The Court noted, without concern, that the copyright term would have been extinct, but for the 1976 Act, and that Congress had given authors new rights, which did not exist when the work was created, to protect authors who were unable to profit from works that became valuable long after they were created. *Mills Music*, 469 U.S. at 172-73.

created by artists such as Billie Holiday, Vladimir Horowitz, Miles Davis, Frank Sinatra, the Beatles, Louis Armstrong, and Elvis Presley.

That overall approach to protection of sound recordings – state protection for pre-1972 recordings and federal protection for later recordings – was retained in the general overhaul of federal copyright laws in 1976, with one significant exception. Under many state laws, such as California's, pre-1972 sound recordings enjoyed *perpetual* protection. In 1976, Congress determined that such protection under state law for pre-1972 recordings should be limited in duration, and the 1976 Copyright Act therefore preempted such state laws effective February 15, 2047, at which time the recordings would pass into the public domain. Act of Oct. 19, 1976, Pub. L. No. 94-553, 90 Stat. 2541, 2572. In other words, the 1976 Act *cut short* the perpetual term of protection given to pre-1972 recordings when they were created. The CTEA amended that provision by extending the date for preemption of state-law protections for pre-1972 recordings by 20 years, to February 15, 2067. CTEA, § 102(a), 112 Stat. at 2827, *codified at* 17 U.S.C. § 301(c).

This history is significant in two ways. First, it refutes Petitioners' oversimplified characterization of the CTEA as extending the duration of the copyright protection enjoyed by works when they were created. In fact, when pre-1972 sound recordings were created, they enjoyed *perpetual* protection under many state laws. In 1976 Congress cut that perpetual protection short. Against that background, CTEA merely *restores* (in part) the protection that pre-1972 recordings were to receive when they were created – protections that, on Petitioners' own theory, were part of the incentive for the recordings' creation, or the *quid pro quo* for their release to the public. Thus, the basic premise behind Petitioners' arguments has no applicability as it applies to pre-1972 sound recordings, because the statute did not extend

the original term of protection for those recordings. CTEA is therefore plainly constitutional as it applies to pre-1972 sound recordings, even on Petitioners' own theories.[10]

Second, Congress's extension of federal copyright protection to sound recordings in 1972 highlights the fallacy in Petitioners' attempt to distinguish the 1790 copyright extension. In 1972, Congress had to decide how to create a federal law of copyright for sound recordings when there already existed state-law protection for the same works in many States. The First Congress faced exactly this situation, but with respect to books, charts, and maps.

Prior to 1790, every State but Delaware had legislation giving copyright protection to authors. *See* Copyright Office, *Copyright Enactments, 1783-1900*, at 9-29 (Gov't Printing Office 1900). In several States, however, that protection lasted less than 28 years, and in no State was it longer than 28 years (including renewal years). *Id.* North Carolina had a copyright term of 14 years, *id.* at 23; New Hampshire 20 years, *id.* at 16; Rhode Island and Virginia 21 years, *id.* at 17, 22; and, of course Delaware, with no copyright law, provided protection for zero years. When Congress enacted the first federal copyright law in 1790, it *extended* the original terms of the state-law copyrights enjoyed by *pre-existing* works – *i.e.*, "any map, chart, book or books *already printed* within these United States" – to a total of 28 years. Act of May 31, 1790, 1 Stat. 124, § 1 (emphasis added) (providing for 14-year initial term plus 14-year renewal term). Moreover, the new federal copyright term of 28 years ran from the time the pre-existing work was registered in accordance with the new federal law. *Id.* In other words, Congress extended to authors of existing works a new 28-year copyright, regard-

[10] In the extremely unlikely event that CTEA were held unconstitutional, the Court should make clear that CTEA is constitutional as it applies to pre-1972 sound recordings.

less of when the work had previously been published or how long its remaining term of copyright was under state law.

That 1790 Act was the first of several copyright term extensions applicable to pre-existing works, stretching over 200 years from the Nation's Founding to the enactment of the CTEA in 1998. *See* Br. *Amicus Curiae* of Motion Picture Association of America, Section I.A.2. This unbroken history is fatal to Petitioners' arguments:

> The construction placed upon the constitution by the first act of 1790 . . . by the men who were contemporary with its formation, many of whom were members of the convention which framed it, is of itself entitled to very great weight, and when it is remembered that the rights thus established have not been disputed during a period of nearly [two] centur[ies], it is almost conclusive.

Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 57 (1884).

Recognizing that the 1790 Act is particularly fatal to their argument, Petitioners attempt to distinguish that law.[11] But to no avail. According to Petitioners, the extension of pre-existing copyright terms by the first Congress was necessitated by the unique context of the transition from a state-law regime to a unified national system. Pet. Br. 28-30. But Congress's treatment of pre-existing state-law copyrights for sound recordings in 1972 demonstrates that creating a unified

[11] Petitioners also concede that accepting their argument would render several other Acts of Congress throughout the nineteenth and twentieth centuries suspect. Pet. Br. 30. Petitioners make a weak attempt to distinguish those prior enactments from the CTEA based on the registration requirements in the earlier laws, Pet. Br. 30 n.13, but that distinction obviously provides no defense to their First Amendment and Copyright Clause arguments against retroactivity.

national system of copyright in no way necessitates the extension or alteration of the copyright terms applicable to already published works under state law. Just as it did with pre-existing sound recordings in 1972, in 1790 Congress could have made federal copyrights available to new works, while leaving the protections of state law in place for pre-existing works. Nothing in the Copyright Clause eliminated the States' power to grant copyrights or required Congress to preempt existing state laws. *Goldstein*, 412 U.S. at 560. Moreover, even if Congress had wanted to supplant state law entirely, doing so did not necessitate giving authors of pre-existing works longer copyright terms than they enjoyed at the time they created their works. The first Congress could have made the term of federal copyrights for pre-existing works the same as the remaining term under any state-law copyright covering that work. But it chose not to do so.

In short, the first Congress's choice to extend the terms of existing copyrights was in no way necessary to a unified national regime. Rather, as the title of the 1790 Act indicates, the purpose of that retroactive extension was "the encouragement of learning, by securing the copies of maps, charts, and books, to the authors and proprietors of such copies." Act of May 31, 1790, 1 Stat. at 124. Thus, the first Congress, like the Congress that enacted the CTEA, recognized – contrary to the economic theory Petitioners would have this Court constitutionalize – that incentives for the dissemination of existing works, and not just incentives for the creation of new works, serve the "encouragement of learning" and are well within Congress's powers under the Copyright Clause.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

Matthew J. Oppenheim
Stanley Pierre-Louis
RECORDING INDUSTRY
ASSOCIATION OF AMERICA
1330 Connecticut Ave., N.W.
Suite 300
Washington, D.C. 20036
(202) 775-0101

Donald B. Verrilli, Jr.
Counsel of Record
Thomas J. Perrelli
William M. Hohengarten
JENNER & BLOCK, LLC
601 13th Street, N.W.
Washington, D.C. 20009
(202) 639-6000